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Order 2001-3-9

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 12th day of March, 2001

Served March 12, 2001

Petition of

Billy J. Williams & Patricia L. Young

for Revocation of Air Carrier Certificate of

Delta Air Lines, Inc. under 49 U.S.C. 41110(a)(2)(B)

for violations of 49 U.S.C. 41705 (the Air Carrier Access Act) and 14 CFR Part 382

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ORDER OF DISMISSAL

On September 1, 2000, Billy J. Williams and Patricia L. Young filed a petition seeking the revocation of the certificate authority of Delta Air Lines, Inc., under 49 U.S.C. 41110(a)(2)(B). The petition claims that the carrier's violations of the Air Carrier Access Act (49 U.S.C. 41705) demonstrate a policy of discrimination toward disabled passengers and warrant certificate action if the carrier is unwilling, after being directed to do so by the Department, to cease its discriminatory practices. As its principal allegation, the petition asserts that the air carrier, by allowing smoking at its airport facilities, renders those facilities inaccessible to those who, like the petitioners, are especially sensitive to ambient tobacco smoke. The petition traverses much of the same ground covered in a complaint filed by Mr. Williams against American Airlines in 1993.[1] In view of

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1 Mr. Williams filed a similar complaint against American Airlines in 1993, in which he alleged that American violated the ACAA and 14 CFR Part 382, the Department's implementing rule, by failing to ban smoking in its Admiral Club airport facilities. To permit smoking in these facilities, the complainant argued, effectively made them inaccessible to passengers sensitive to tobacco smoke. The Department dismissed the complaint in Order 94-12-37, stating that imposition of a smoking ban at American's airport clubs would constitute an "undue burden" contrary to the requirements of the ACAA.

the allegations contained in the pleading and the requested relief against Delta, we have decided to treat the petition as a formal complaint under 14 CFR 302.200.

PETITION AND FURTHER PLEADINGS

The petition claims that Delta "knowingly, willfully and intentionally" failed to make its airport facilities accessible to those who are sensitive to tobacco smoke. This allegation is made both generally, with respect to all of Delta's airport facilities, and specifically, with respect to the Cincinnati/Northern Kentucky International Airport. Delta's violations extend, according to the complaint, to the construction of smoking lounges which are similarly not accessible, and to entering into contracts and leases with airport operators which do not clearly spell out the responsibilities of such contractors to comply with the ACAA and 14 CFR Part 382, the Department's implementing regulation, with regard to smoking.

Delta filed an answer to the pleading in which the carrier claims that the complainants had failed to establish that they are "qualified disabled" persons within the meaning of the Department's rule. The response also states that the complaint contains vague, unsubstantiated claims of violations with respect to all of Delta's facilities and fails to recognize that neither Delta nor the Department has authority to compel a local airport operator to comply with Part 382. In the case of the Cincinnati airport, the Kenton County Airport Board, Delta states, has established smoking policies that reflect, among many factors, the requirements of Kentucky state law which specifically permits smoking in public facilities.

In a reply to the carrier's answer, the complainants affirm that they are qualified disabled persons and claim that the Department has the authority and the obligation to impose a total smoking ban on airport facilities in "appropriate instances." In support of this assertion, the complainants cite the 1996 amendments to 49 CFR Part 27, the Department's rule prohibiting discrimination on the basis of disability in programs receiving federal aid, and 14 CFR Part 382, as requiring that the Department apply standards of the Americans with Disabilities Act (ADA, 42 U.S.C. 12111, et seq.) to airports and air carriers. Recent case precedent, the complainants contend, also supports the authority of the Department to prohibit smoking in airport terminals.

The carrier's surreply to the complainants' filing disputes many of these points. Delta repeats its claim that neither complainant has established that he or she is disabled under 14 CFR 382.5 for purposes of the ACAA, nor have the complainants shown that they have in fact been denied access to any Delta facility. It claims that the Department's own precedent in dismissing Mr. Williams' previous complaint against American Airlines, alleging similar violations of the ADA and ACAA, remains good law and should be followed in

this instance. Pending rulemaking proceedings, the carrier points out, indicate that the Department does not contemplate preempting state and local precedent in the regulation of smoking in airport facilities, although it is still considering whether to require airport operators to provide smoke-free paths within airports for persons with respiratory impairments. What the complainants apparently want, according to Delta, is a complete smoking ban at all airport facilities. An enforcement proceeding, the carrier argues, is not the appropriate vehicle to use in considering such a major change in policy, especially in light of the recent rulemaking proceedings.

DECISION

We believe that the petition does not state adequate grounds for pursuing an enforcement complaint against the respondent carrier. The complaint, we note, fails to provide clear support for the complainants' contention that they are in fact "qualified individuals with a disability," as defined in section 382.5, and are hence within the scope of the rule. More importantly here, the complaint fails to recognize that the ADA, the ACAA, and the related Department rules place limits on the obligation to modify facilities in order to render them accessible to those with sensitivity to tobacco smoke. We will, therefore, dismiss the complaint.

With respect to the complainants' standing, the complaint provides only a cursory description of the respiratory conditions which are the apparent basis of the complainants' claims. Both assert that they suffer from hypersensitivity to tobacco smoke and, in support, refer to decisions by the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor. However, neither decision is recent and, in Ms. Young's case, there is a subsequent judicial determination specifically denying her status as a disabled individual for purposes of the ADA.[2] We will, however, assume, as we did in Order 94-12-37 which dealt with Mr. Williams' previous complaint, that the complainants here are "qualified disabled individuals" within the meaning of Part 382 and will examine the complaint's allegations accordingly.

As the Department indicated in Order 94-12-37, qualified disabled passengers do not have an unqualified right of access to all airport and airline facilities. The legal obligation, as stated in both the ACAA and the ADA, is to provide nondiscriminatory access without imposing "undue burdens" or mandating

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2 Mr. Williams relies on a 1983 decision by the OFCCP to support his claim of hypersensitivity to tobacco smoke, while Ms. Young cites a similar decision of May 1994. Both decisions occurred in an employment context where the standards for determining the existence of a qualifying disability may not be consistent with the standards applicable under Part 382. In *Diane G. Emery and Patricia L. Young v. Caravan of Dreams*, 879 F. Supp 640 (N.D. TX 1995), the court explicitly found that Ms. Young was not a disabled person within the meaning of the ADA. Ms. Young, in her suit, had claimed that the defendant theater operator's failure to prohibit smoking constituted discriminatory conduct under the statute.

"fundamental changes in the carriers' programs." We reiterate those points on this occasion. Language similar to that cited in our earlier decision and in pertinent Department rulemakings appears in the ADA.[3] The ADA specifically recognizes, in defining the required remedial steps, that modifications to make services or facilities accessible to disabled individuals are not mandated if, "the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. 12182 (b)(2)(A). This is the ADA Title III standard which applies to air carriers under Part 382 and it is the standard the Department followed in dismissing Mr. Williams' prior complaint in November 1994. The revisions to Parts 27 and 382 adopted in November 1996, on which the complainants rely, merely adopt explicitly, with respect to those regulations, the standard of reasonableness inherent in the statute.[4] The revisions neither imply nor require any change in policy on the part of the Department regarding the accessibility of airport facilities.

In their current complaint, Mr. Williams and Ms. Young appear to advocate a complete ban on smoking in at least certain airports, although the complaint primarily discusses Delta's facility at Cincinnati's airport. A broad proposal such as this is clearly beyond what should be contemplated in an enforcement proceeding. This conclusion is especially apt here since the Department initiated a rulemaking proceeding in 1996 that encompassed the matters raised in the Williams and Young complaint, including the issue of smoke-free airports and the feasibility of a "smoke-free accessible path" within airports to accommodate those with respiratory impairments. After receiving comments on this and other disability issues raised in the notice of proposed rulemaking, the Department determined that, for reasons cited in the final rule, it would not at that time propose a rule addressing smoking at airports. The Department, however, did not foreclose the possibility that it might do so in the future.[5] In view of the Department's decision and for the other reasons stated above, resolution of the issues raised by the complainants is clearly not appropriate in an enforcement context. Therefore, the pursuit of enforcement action here is not in the public interest.

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3 In a final rule, Non-discrimination on the Basis of Handicap in Air Travel, 61 FR 56417, November 1, 1996, the Department explicitly accepted the standards of Title II of the ADA with respect to operators of airports under 49 CFR Part 27 and adopted the standards of Title III with respect to common carriers. The revisions to Part 27 required that airport operators and carriers cooperate in providing boarding assistance for disabled passengers on small aircraft. The carriers and airport operators are, under the rule, to enter into a written agreement setting the responsibilities of each in providing this assistance.

4 Section 504 of the Rehabilitation Act (29 U.S.C. § 794), the statutory authority for 49 CFR Part 27, prohibits the discriminatory treatment of disabled individuals in any program receiving federal funds.

5 63 Fed. Reg. 10528, 10529. (March 4, 1998).

ACCORDINGLY, I dismiss the third-party complaint in this docket.

This order is issued under authority assigned in 14 CFR 302.406(b) and shall be effective as the final action of the Department within 30 days after service.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings